BEFORE THE
ILLINOIS COMMERCE COMMISSION

In the Matter of	)	
	)	
Petition for Arbitration of XO	)	
COMMUNICATIONS SERVICES, INC.,	)	Docket No. 05-0763
of an Amendment to an Interconnection	)	
Agreement with SBC ILLINOIS, INC.	)	
Pursuant to Section 252(b) of the	)	
Communications Act of 1934, as	)	
Amended		

REPLY BRIEF ON EXCEPTIONS OF XO COMMUNICATIONS SERVICES, INC.

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XO Communications Services, Inc. ("XO") submits the following Reply Brief on Exceptions to the Administrative Law Judge's Proposed Arbitration Decision ("PAD") issued on February 8, 2006. This arbitration proceeding is a single issue proceeding, i.e. whether or not AT&T Illinois can retain excess profits it receives when it incorrectly designates wire centers as non-impaired. The PAD correctly ruled in favor of the majority of XO's positions and rejected the positions of AT&T Illinois and Staff. XO is in agreement with the ALJ's proposed modifications to XO's language as described in the PAD.

In large part, AT&T Illinois' Exceptions amount to no more than a regurgitation of the arguments in its Initial and Reply Briefs. The ALJ heard those arguments, reviewed them in regards to applicable law, and rejected them when preparing his PAD. In its Brief on Exceptions, AT&T Illinois also proposes potential revisions to the PAD that were not proposed in its earlier filings in this proceeding or offered to XO during

negotiations. For the reasons detailed in XO's Initial and Reply Briefs, and those presented below, the Commission should reject AT&T Illinois' positions and revisions, and enter an order consistent with the PAD and XO's positions detailed herein.

I. RESPONSE TO AT&T ILLINOIS EXCEPTIONS

ISSUE 1: SECTION 4.1.6

Should The TRRO Amendment Include A Provision That Addresses Instances Where AT&T Illinois' Designation Of Non-impaired Wire Center(s) Is Found To Be Incorrect And The Wire Center(s) Reverts Back To Being An Impaired Wire Center(s)? If So, What Credits (If Any) And Procedures Should Apply In Connection With The Reversion?

DISPUTED LANGUAGE (XO proposed language shown in bold, underline text; AT&T Illinois' proposed language is shown in bold text)

4.1.6 **If a wire center designated as non-impaired by SBC is later removed from the non-impaired office list due to an error in SBC's classification or an ICC determination resulting from SBC's challenge of XO's or another CLEC's self-certification or by other Commission action, that the office is impaired, CLEC may submit orders to return facilities transitioned to other SBC wholesale facilities back to UNE facilities. SBC shall perform such conversions within ten (10) days and will credit CLEC the difference between the wholesale price paid and the applicable UNE price for the entire period during which the wire center was inappropriately classified as non-impaired or the date of installation, whichever is shorter and will credit all records change charges CLEC paid SBC for all UNEs transitioned due to SBC's erroneous wire center classification. Such credits shall be placed on CLEC's invoice within two (2) billing cycles.**

If SBC Illinois has designated a wire center as non-impaired, CLEC has self-certified with respect to that wire center during the relevant time period specified in this Agreement, and SBC has disputed such self-certification, in the event prior to a Commission ruling on the dispute SBC learns through its own investigation (and based on its sole judgment) that an SBC error or errors caused the wire center to be deemed non-impaired (that it, the wire center would be deemed impaired but for those errors), SBC will promptly provide CLEC notice of the error stating that SBC is reclassifying the wire center as impaired (subject to SBC's rights to later re-designate the wire center at a later date if the non-impairment criteria are met.

PAD LANGUAGE

Section 4.1.6. In the event SBC error(s) caused a wire center to be deemed non-impaired (that is, the wire center would be deemed impaired but for those errors), SBC will promptly provide CLEC and the Commission notice of the error and will reclassify the wire center as impaired. When a wire center designated as non-impaired by SBC is reclassified as impaired due to an error in SBC's classification, CLEC may submit orders to return facilities transitioned to other SBC wholesale facilities back to UNE facilities. SBC shall perform such conversions within fifteen (15) days. Insofar as CLEC has not self-certified its entitlement to UNE facilities at the pertinent wire center, AT&T will credit CLEC the difference between the wholesale price paid and the applicable UNE price for the entire period during which the wire center was inappropriately classified as non-impaired or the period between the date of installation and the date of conversion (whichever is shorter), less any period during which CLEC's self-certification applied, and will credit all records change charges CLEC paid SBC for all UNEs transitioned due to SBC's erroneous wire center classification. Such credits shall be placed on CLEC's invoice within two (2) billing cycles.

AT&T Illinois seeks to reverse the PAD finding that "XO may recoup the price difference between wholesale services and UNEs when AT&T Illinois has erroneously classified a wire center as non-impaired *and* XO has not self-certified its entitlement to UNEs at that wire center."[1] AT&T Illinois also argues that if the decision is not reversed, the approved language should be revised to place a one (1) year cap on any AT&T Illinois obligation to provide retroactive true-ups under Section 4.1.6.[2]

AT&T Illinois' primary argument to reverse the PAD, reiterating its arguments in other briefs in this proceeding, is that XO has the right to continue to get unbundled high-

[1] PAD at 9
[2] AT&T Illinois Brief on Exceptions at 10

capacity loops and dedicated transport at any wire center at which XO issues a self certification. According to AT&T Illinois, all XO has to do to protect itself is to self-certify. AT&T Illinois, however, continues to ignore the fact that XO has an obligation to perform a "reasonably diligent inquiry" prior to making such a self certification and that, to date, AT&T Illinois has refused to provide even the basic data AT&T Illinois itself used to designate wire centers as non-impaired.[3] AT&T Illinois apparently suggests that XO should self-certify in every designated wire center "just in case." This would be an abuse of the process envisioned by the TRRO and an incorrect reading of the TRRO requirements.

AT&T Illinois takes the unreasonable position that the only CLECs that can be reimbursed for excess charges when AT&T Illinois makes an incorrect designation of non-impairment are those that have self-certified. AT&T Illinois, however, holds all of the relevant information and makes the non-impairment designations. AT&T Illinois' proposal is that reimbursement for AT&T Illinois' errors can only be had if CLECs are willing to follow AT&T Illinois' advice to self certify in every wire center regardless of what a reasonably diligent inquiry could uncover. Adoption of such a rule would be contrary to the TRRO and public policy. Very simply, XO should not be financially harmed because of AT&T Illinois' error.

In its Brief on Exceptions, AT&T Illinois takes exception to four of the PAD's findings. XO addresses each of these exceptions below.

[3] On February 6, 2006, AT&T Illinois provided some of the required data in Docket 06-0029, under protective cover of that docket. AT&T Illinois, however, has not made any commitment to continue to provide such data as wire centers are added to the non-impairment list in the future.

AT&T ILLINOIS EXECPTION 1

In Exception 1, AT&T Illinois continues to repeat its arguments concerning XO's ability to self certify and thus, in AT&T Illinois opinion, avoid the financial burden of higher wholesale rates in offices that AT&T Illinois might just have gotten wrong. Given that AT&T Illinois adds little that is new to this debate XO will only respond briefly. In Exception 1, AT&T Illinois generally repeats positions from its prior briefs that XO can avoid greater expense by always self-certifying. XO has previously addressed AT&T Illinois' argument. As stated in its Reply Brief, XO takes the good faith requirement in the self-certification process seriously. XO will not, as AT&T Illinois and the Staff appear to want it to do, self certify first and ask questions later. Rather, XO wants to conduct (and the TRRO requires) "a reasonably diligent inquiry and, based on that inquiry, self-certify…"[4] Yet, as XO noted in its Reply Brief at 3-4, AT&T Illinois has thwarted previous efforts by XO to conduct such a reasonably diligent inquiry. Since February 18th, 2005, XO has repeatedly requested the underlying data that AT&T utilized to designate wire centers as non-impaired. AT&T Illinois has refused to provide this data. The necessary data can only be obtained from AT&T Illinois because it is the repository of all relevant information: the numbers of business lines and loops served out of the wire center, the number and identity of fiber-based collocators, etc. Because CLECs need such information to conduct their diligent inquiry, the information upon which they base their self certifications will only be as good as their source – and in this case, AT&T Illinois is the only source. AT&T Illinois clearly is in the best position to ensure that its wire center designations are accurate. XO has no way of knowing whether another carrier has been inaccurately designated as a fiber based

[4] TRRO at ¶234

carrier or whether AT&T Illinois incorrectly "thinks" that a particular CLEC is collocated in a particular office. In summary, XO cannot be assured that its self-certifications cover all of the potential errors that AT&T Illinois might make in designating offices as non-impaired. Therefore, XO should not be financially penalized for deciding not to challenge an AT&T Illinois incorrect designation based on the information it was able to acquire and AT&T Illinois should not be rewarded for the double misfeasance of incorrectly designating a wire center as non-impaired and withholding information from XO that would have allowed it to make a good faith self-certification.

AT&T Illinois' new claim that XO only needs to consider the available facts is disingenuous in that AT&T Illinois will not share those available facts with XO and the other CLECs. The *available* facts may support AT&T Illinois' wire center designations but the facts have not been provided to XO. XO, should not be required to self-certify when it has no tangible basis for doing so – and incur the expense of litigating the issue – solely to protect itself from the possibility that information not available to XO would demonstrate that AT&T Illinois' designation is erroneous.

Section 4.1.6, as proposed by XO and with the ALJ's modifications, properly places the burden on AT&T Illinois to ensure the accuracy of its wire center designations, including precluding XO from financial harm resulting from AT&T Illinois' mistakes. The Commission should adopt this contract language.

Some of AT&T's arguments either misrepresent or fail to comprehend the PAD. For example, the ALJ made the common sense observation that Paragraph 234 of the TRRO "only imposes such duty on a CLEC [self certification] when it elects 'to submit an order to obtain' the relevant UNEs, not when the CLEC elects *not* to do so." PAD at

7. In other words, the ALJ noted that the FCC did not require CLECs to conduct a "reasonably diligent inquiry" for every wire center in their service territories. Rather, the FCC expected a "reasonably diligent inquiry" into the impairment designation of wire centers where the CLECs request UNEs. AT&T Illinois misinterpreted this statement as absolving XO of the requirement to self certify in wire centers where XO has existing UNEs. According to AT&T Illinois, the ALJ was only requiring XO to self certify future UNE orders, with existing UNEs apparently being grandfathered. AT&T Illinois BOE at 5. Thus, the remainder of AT&T Illinois' argument on this issue attacks a point never made in the PAD.

AT&T ILLINOIS EXECPTION 2

In Exception 2, AT&T Illinois argues that the PAD should be revised to eliminate or extend the conversion period within which AT&T Illinois must convert wholesale services to UNEs. AT&T Illinois primary argument seems to be that XO, in AT&T Illinois' opinion, did not *prove* that XO's proposal of a ten (10) day period for conversions was appropriate. Yet, AT&T Illinois did not disprove the appropriateness of a ten (10) day conversion period or propose in its previous briefs or in negotiations, any reasonable alternative conversion period. To the contrary, the parties agreed that AT&T Illinois would convert wholesale services to UNEs within 15 days, as found in Section 3.15.3 of their TRO Amendment that the Commission previously approved.[5] AT&T Illinois has no reasonable basis for claiming that such conversions resulting from

[5] *In the Matter of Petition for Arbitration of XO Illinois, Inc., of an Amendment to an Interconnection Agreement with SBC Illinois, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended*, Final Order in Docket 04-0371 at 22, 26 (Conforming Amendment approved in Docket 04-0667).

erroneous wire center designations should take any longer period of time. As noted in the PAD, AT&T Illinois waived its right to argue for a greater period of time. The ALJ stated "Additionally, the Commission finds that the parties freely waived their opportunity and right to offer direct evidence on this point." PAD at 9.

Ignoring its previous failure to submit evidence or argument on this issue, AT&T Illinois, however, argues that "there is also a great discrepancy between the period of time allowed to the CLECs for the transition away from affected UNEs (12-18 months) and the period of time given to AT&T Illinois to transition back to those same UNEs (15 days)." And then, out of the blue, with no justification suggests that the conversion period be extended to ninety (90) days. AT&T Illinois BOE at 10.

First, contrary to AT&T Illinois' repetitious argument, the conversion at issue in this proceeding is not the same as the period of time allowed to the CLECs for the transition away from affected UNEs (12-18 months). XO noted in its Reply Brief that XO and the other CLECs have a 12-month transition period because AT&T Illinois controls which wire centers are placed on the non-impairment list and CLECs have no forewarning that a wire center might be placed on that list. Additionally, XO requires additional time to determine which services to disconnect and which wholesale services to convert to services other than UNEs. AT&T Illinois, on the other hand, will know exactly what wire centers are in question and what circuits need to be reclassified, and billed as UNEs when a wire center is determined to have been inappropriately designated as non-impaired.

Additionally, AT&T Illinois' proposed ninety (90) day conversion period is excessive given that XO will still be billed, and expected to pay, the higher wholesale

rates during that period – thus having an negative impact on cash flow. Nevertheless, if the Commission accepts AT&T Illinois' new proposal, the Commission should also clarify that the credits AT&T Illinois provides to XO include interest during this time period.

AT&T ILLINOIS EXECPTION 3

AT&T Illinois argues, at Exception 3, that if the Commission does not see fit to entirely eliminate Section 4.1.6, the PAD be revised to place a one (1) year cap on any AT&T Illinois obligation to provide retroactive true-ups under Section 4.1.6. AT&T Illinois did not make this proposal in any previous filing in this proceeding or in its negotiations with XO. The record in this matter is based on what the parities submitted on December 3, 2005 and in AT&T Illinois' response on December 14, 2005. It is improper for AT&T Illinois to attempt to interject a new unsupported proposal at this late date. In any event, AT&T Illinois again misses the big picture; the point being that if AT&T Illinois has made an error in designating a wire center as non-impaired, which has resulted in XO having to convert UNEs to higher priced wholesale services, then AT&T Illinois should not be allowed to reap a financial benefit from its error. AT&T Illinois' proposal, however, shows that it is willing to give up a little of the excess fees it charged due to its own error, but wants to retain the remainder of the improper charges, thus paying for a little bit of its error but not the whole error. AT&T Illinois' proposal is thus both too little and too late.

AT&T Illinois further opines that "the one year cap would reduce the administrative burden placed on the Commission and the parties in the event any

retroactive credits are called for under the provision." AT&T Illinois BOE at 10. XO does not deny that there will be work involved in determining the credits, and potentially disputes between the companies. However, this is business as usual, and the Commission should not fall for this spurious argument. AT&T Illinois has a long history of back billing CLECs and other carriers for errors it uncovers in its billing processes. XO and AT&T Illinois have a process in place (and use it frequently) for handling these types of disputes, and invariably they reach settlements between the companies rarely taking any such dispute before a Commission. In fact, XO is not aware of any such dispute between itself and AT&T Illinois being brought before this Commission.

The Commission should keep in mind that when AT&T Illinois makes an error in designating a wire center as non-impaired, and XO has not had the data (which is in AT&T Illinois' possession) to perform a reasonably diligent inquiry to issue a self-certification, XO must convert unbundled network elements to higher priced wholesale services – simply because AT&T Illinois was wrong. There is nothing in the TRRO, or this Commission's practices, which would suggest that AT&T Illinois should reap a financial benefit from its errors.

AT&T ILLINOIS EXECPTION 4

Admittedly, XO is a bit confused by Exception 4. XO reads AT&T Illinois' Exception 4 to be requesting the rejection of the ALJ's proposed language for Section 4.1.6, as well as XO's language and AT&T Illinois' own language. Or, in the alternative, to modify the language as AT&T Illinois has proposed in its Attachment 2.

For the reasons provided throughout this Reply Brief, XO does not believe that the ALJ's proposed language for Section 4.1.6 needs to be modified in any way.

II. CONCLUSION

For the reasons set forth in this Reply Brief on Exceptions, the Commission should adopt the PAD in its entirety.

March 1, 2006

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Kevin D. Rhoda, do hereby certify that I have, on this 1st day of March 2006 caused to be served upon the following individuals, by e-mail, a copy of the foregoing Reply Brief on Exceptions of XO in docket 05-0763.

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